COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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RE: Charles Lillis, et al. v. AT&T Corp. and AT&T Wireless Services, Inc. C.A. No. 717-VCL

Dear Counsel:

The court has considered the briefs and oral arguments in connection with the pending motion to compel the payment of legal and expert fees. For the reasons set forth herein, the motion will be granted, except as noted.

I.

This case arises out of a dispute concerning the proper payment for certain options granted to former executives of MediaOne. The plaintiffs brought various claims in contract relating to these options, including a claim for advancement of their attorneys' fees in connection with their prosecution of the litigation. The plaintiffs successfully moved for judgment on the pleadings on the advancement claim, and were awarded advancement by order of May 22, 2006. That order was never appealed.

The underlying substantive claims proceeded to trial, the result of which was the entry of judgment on August 3, 2007 against AT&T in favor of the plaintiffs. AT&T timely appealed the judgment and, on May 22, 2008, the Supreme Court remanded the case to this court with instructions to report what its conclusions

would have been given a certain change in the facts, and retained jurisdiction over the case. On June 6, 2008, the plaintiffs moved for reargument in the Supreme Court. That motion was stricken, but the issues raised were later argued after the remand decision.

On July 21, 2008, this court delivered its report to the Supreme Court concluding that if deciding the case again on the basis of the instructions given to it on remand, it would have decided the case in favor of AT&T. This created an unusual posture for the appeal. Because the Supreme Court retained jurisdiction, the plaintiffs remained appellees in the Supreme Court, and AT&T remained the appellant. Nevertheless, following the remand report, the plaintiffs would have the heavy burden of convincing the Supreme Court that it had committed a factual error in its earlier decision. With the Supreme Court's permission, the parties switched roles in briefing, and, on rehearing before the Supreme Court on November 5, 2008, the plaintiffs argued as appellants and AT&T argued as appellee. The decision of the Supreme Court is pending.

Meanwhile, on August 12, the plaintiffs' Delaware counsel, Abrams & Laster, sent AT&T an invoice for $146,834.06, covering services rendered from June 1 through July 30, 2008. AT&T responded that it would only reimburse $102,486.06 of this amount, claiming that the remainder was unreasonable, excessive, or duplicative. In an effort to resolve the dispute, Abrams & Laster agreed to reduce its invoice by $2,976.58. AT&T denied responsibility beyond the $102,486.06.

On August 27, the plaintiffs sent AT&T invoices for work performed by expert witnesses Forensic Economics and Professor Gregg Jarrell. AT&T responded that it would not pay any portion of the expert invoices. On October 9, the plaintiffs' New York counsel, Weil, Gotshal & Manges, sent AT&T invoices and detailed billing statements for $343,222.23, covering services and expenses for the period of July 1 through September 30, 2008. Before even sending that invoice, Weil Gotshal wrote off $26,117 of fees and expenses without prompting from AT&T.[1] On October 14, the plaintiffs moved to compel AT&T to advance payment for the expert invoices. On October 24, AT&T claimed that approximately two-thirds ($189,956.76) of the Weil Gotshal invoiced amount was unreasonable, excessive, or duplicative, and remitted only $153,265.47. On

[1] In all, counsel for the plaintiffs claim to have written off between $50,000 and $60,000 in legal fees during the time period at issue here.

October 31, the plaintiffs filed a new motion to compel, consolidating their prior demand for payment of expert fees with a demand for attorneys' fees. On January 9, 2009, the court heard oral arguments on that motion.

II.

When, as here, a contract entitles a party to recover attorneys' fees and expenses from an adversary party, the court is obliged when an objection is made to examine the requested fees and expenses for reasonableness.[2] When conducting this reasonableness analysis, the court should exclude costs which are excessive, redundant, duplicative, or otherwise unnecessary.[3]

Each of AT&T's objections to the various invoiced amounts will be taken in turn below.[4]

A. *Preparation for the November 5, 2008 Delaware Supreme Court Argument*

AT&T argues that it was unreasonable to bill 154 hours of attorney time (115 hours by Weil Gotshal and 39 hours by Abrams & Laster) in preparation for the November 5 oral argument before the Delaware Supreme Court following the remand report. AT&T attempts to justify this position by suggesting that the issue to be argued that day was simple, and generally concerned issues already researched and argued earlier in the case—whether the Supreme Court had erred when it held in its May opinion that AT&T had not made certain evidentiary admissions regarding the stock option plan at issue. However, this simple, or more precisely, narrow, issue is also dispositive of the entire case. Several years of litigation and any hope of recovering on a claim upon which they had initially prevailed in this court depended upon the plaintiffs' ability to convince the Supreme Court to reverse itself and vacate its earlier decision. The Supreme Court does not often do so, and the burden the plaintiffs faced in attempting to obtain such relief was heavy indeed.

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[2] *See Mahani v. Edix Media Group, Inc.*, 935 A.2d 242, 245 (Del. 2007); *see also* Del. Lawyers' Rules of Prof'l Conduct R. 1.5(a).
[3] *See Mahani*, 935 A.2d at 247-48.
[4] Letter subheadings for the objections correspond to the letter subheadings in section II of AT&T's brief in opposition.

The preparation necessary for an oral argument is certainly affected by the procedural posture of the case, which party has the burden of persuasion, and the weight of that burden. AT&T suggests that the plaintiffs' counsel's total preparation time of 154 hours was unreasonable when compared to its own counsel's 58 hours of preparation time. However, when AT&T was in the position of appellant seeking to have the original judgment of this court reversed, its counsel spent 166 hours in preparation for oral argument. Given the procedural posture and the gravity of the argument, this court finds that the 154 hours billed by Weil Gotshal and Abrams & Laster were reasonable in the circumstance.

B. *The Plaintiffs' Motion for Reargument*

AT&T challenges 19.1 of the 42 hours billed by Abrams & Laster in assisting Weil Gotshal in preparing the June 6, 2008 motion for reargument to the Supreme Court.[5] Most of AT&T's objections to Abrams & Laster's time center around the 17.2 hours spent in helping to review and revise the motion for reargument prior to its filing. The court finds this argument uncompelling. Despite AT&T's suggestion to the contrary, Delaware local counsel does not exist simply to act as a mailbox for out-of-state counsel. The plaintiffs' counsel made quite clear at oral argument that the preparation of all of their briefs to the Supreme Court (as well as to this court) were a result of a collaborative effort, as they should be, between Weil Gotshal and Abrams & Laster.

AT&T additionally objects to 3 hours spent on June 3-4 by Abrams & Laster to "[e]xamine and analy[ze]" a color coded chart made by Weil Gotshal as an exhibit for the motion for reargument. AT&T also objects to some unspecified fraction of 2.8 hours spent by Abrams & Laster on June 4 in outlining the reargument brief after it had already been written. These arguments are not entirely without merit, although the activities do not seem entirely unreasonable. The court will therefore disallow half of the time spent on these activities—that is, 1.4 of the 2.8 hours spent outlining the brief, and 1.5 of the 3 hours spent analyzing the chart.

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[5] AT&T has paid and does not object to the 62.1 hours billed by Weil Gotshal in preparing this motion and the remaining 21.9 hours of Abrams & Laster's time associated with this motion. The motion was stricken by the Supreme Court pursuant to Supreme Court Rules 18 and 34.

C. *The Plaintiffs' Briefs on Remand*

AT&T makes the same argument with respect to 76 of Abrams & Laster's hours spent on the remand briefs to this court as it does with respect to the 17.2 hours of Abrams & Laster spent on the motion for reargument. Essentially, the objection is that local counsel should have been less involved in refining the work of out-of-state counsel in preparing the briefs. This argument has already been rejected.

In addition, AT&T objects to a handful of hours spent by Abrams & Laster in researching topics it claims have been in contention since the beginning of this case. AT&T claims that such "rudimentary" research has no place at this late stage of the case. The law, however, is not static, and a few hours of research to ensure there was no new relevant law does not seem excessive. Because AT&T has not shown that any of the hours spent by Abrams & Laster on the remand briefs were unreasonable, the 76 hours are allowed.

D. *Weil Gotshal Secretarial Overtime*

AT&T also objects to the $2,333 billed for 51.8 hours of secretarial overtime by Weil Gotshal for the period between June 6 and June 20, 2008. The plaintiffs claim that the overtime was necessitated by the expedited briefing schedule for the briefs on remand to this court, that secretarial overtime is customarily charged to clients, and that in any event secretarial overtime is included in the terms of the engagement letter between the plaintiffs and Weil Gotshal.

AT&T has three responses. First, secretarial services (like other overhead) are normally included in a law firm's hourly rates. Second, the terms of the Weil Gotshal engagement letter with the plaintiffs allow secretarial overtime to be billed only in very particular circumstances.[6] Third, the briefing schedule was not expedited.

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[6] AT&T does not necessarily concede that the engagement letter is actually relevant to this analysis, suggesting rather that it is not. Given that the plaintiffs signed the engagement letter and were paying Weil Gotshal's fees long before fee shifting kicked in, the plaintiffs clearly felt that the engagement letter was reasonable. Thus, the terms of the letter are germane to the court's analysis.

Turning first to AT&T's second objection, the "Weil Gotshal Fee and Disbursement Policy" attached to the engagement letter contains the following terms with respect to secretarial overtime:

> Clients are not charged for secretarial overtime either on a full-time or temporary basis. However, clients may be charged for "special situations" at a rate of $45 per hour e.g., when secretaries are used to perform duties in connection with an extended closing. Incidental expenses in relation to secretarial overtime such as transportation and meals subject to appropriate caps are charged to the client.[7]

The example given following the "special situations" provision—in the case of extended closings—supports AT&T's objection. In such a case, the secretary is performing duties directly on behalf of the client. While it is unclear what other types of activities might fall into the category of "special situations," it is clear to the court that the performance of normal secretarial duties on behalf of an attorney outside of normal working hours as a result of a short deadline is not such a "special situation." Therefore, Weil Gotshal is not entitled to bill for those expenses under the engagement letter. The plaintiffs are thus not entitled to compensation for the secretarial fees billed to AT&T.

E. *Mr. Post's Expenses to Attend Oral Arguments*

For the reasons the court expressed at oral argument, AT&T will not be required to pay Mr. Posts's travel expenses.

F. *The Plaintiffs' June 30, 2008 Letter to the Court*

AT&T objects to 7 of Abrams & Laster's 17 hours of attorney time to draft the June 30 two-page letter to the court. AT&T has reimbursed 10 of those hours. The plaintiffs contend in their opening brief (and AT&T does not rebut this contention) that 3.8 of those 17 hours were spent on other billable work in this case, unrelated to the letter.[8] Nevertheless, 13.2 hours is excessive given the length and complexity of the letter. Assuming 10 hours as an upper limit for the work on the letter (which AT&T concedes and has paid), the court finds the 3.8 hours spent on other activities reasonable. The other 3.2 hours are disallowed.

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[7] Pls.' Opening Br., Ex. S, p. 4 ¶ II(e).
[8] This is completely plausible given the compound nature of the billing entries.

G. *July 8, 2008 Letter to the Court*

AT&T objects to 12.3 of the 14.4 hours billed by Weil Gotshal to research and draft a letter to the court of July 8, 2008. This letter brought to the court's attention a decision by Vice Chancellor Strine on June 20, 2008, declining to consider as not fairly presented an argument not raised by a party until its post-trial brief in response. The letter then details four arguments made by AT&T on remand that the plaintiffs contended were waived, based on the Vice Chancellor Strine opinion.

AT&T claims that the plaintiffs argued in their reply brief on remand that "claims not presented in an opening post-trial brief had been waived, [and therefore] all plaintiffs legitimately could have done in this letter was to state that this recent decision supported arguments that plaintiffs previously made."[9] However, AT&T mischaracterizes the plaintiffs' argument in that reply brief. The plaintiffs' reply brief on remand at the cited location was challenging as waived an argument first raised by AT&T in its opening brief *on remand*, not its opening post-trial brief. Accordingly, given the new case law raised in the letter, it was quite reasonable for the plaintiffs' counsel to search the record again for arguments not raised by AT&T until its post-trial briefs to bring them to the court's attention. It is this research that occupied the disputed 12.3 hours of Weil Gotshal's time. AT&T is thus obligated to pay for that time.

H. *The Plaintiffs' Retention of Economic Experts in Connection with the Remand*

AT&T next contends that the retention of experts by the plaintiffs in connection with the preparation of the remand briefs was unreasonable. In support of this argument, AT&T states:

> In their brief, plaintiffs appear now to recognize that the issues that were purportedly "analyzed" by their economic experts were in fact prescribed by the plain terms of the AT&T-MediaOne merger agreement. Plaintiffs' sole response is to assert that whereas AT&T's lawyers understood this elementary fact, that is only because they worked on the AT&T-MediaOne merger and could understand the

[9] Def.'s Br. in Opp'n 17 (citing Ex. U, Pls.' Br. on Remand 12-14).

> plain meaning of its provisions in ways that plaintiffs' lawyers could not. (Pl. 10/14/08 Mtn. at 6-7.)[10]

What the plaintiffs actually argued is:

> AT&T claims the assistance of experts was not reasonable or necessary because the elections were described in its Merger proxy materials. If AT&T's proxy materials provided the answer to the issues AT&T raised on appeal, there would have been no need for the Supreme Court to remand this action to "address fully" those issues. While AT&T, as the author of the proxy materials, may not have needed any assistance in understanding the elections (and ultimately the fallacy of its own argument about the cash election, as is evident from the fact that it has abandoned the argument in the pending appeal), plaintiffs' need for assistance was both reasonable and necessary. This is further evident from the fact that the Supreme Court did not resolve this issue based on the text of the proxy materials.[11]

As then-Vice Chancellor Jacobs stated in *Arbitrium Handles AG v. Johnston*, "[f]or a Court to second-guess, on a hindsight basis, an attorney's judgment concerning whether to retain an expert for a specific purpose, is hazardous and should whenever possible be avoided."[12] The plaintiffs have advanced a legitimate explanation for engaging experts to aid them: AT&T's now-abandoned argument on appeal that only intrinsic value was paid or would have been paid to those who elected to receive cash in the merger. AT&T created the problem when it made that argument. The fact that AT&T later chose not to pursue the argument, and the expert evidence was therefore ultimately not used, is not the plaintiffs' fault. The court will not second-guess the plaintiffs for engaging an expert on that basis. AT&T must pay the disputed expert fees.

I. *The Plaintiffs' Supplemental Briefs to the Supreme Court*

AT&T complains that the plaintiffs spent far too much time drafting their supplemental briefs to the Supreme Court following this court's report on remand.

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[10] Def.'s Br. in Opp'n 21.
[11] Pls.' Br. on Mot. to Compel Payment of Expert Fees 6-7, Oct. 14, 2008.
[12] 1998 WL 155550, at *4 (Del. Ch.).

AT&T argues that the briefs were simply rehashes of the earlier appellate briefs, and should not have required the time spent by the plaintiffs' counsel to prepare them. As detailed in the fact recitation above, however, the plaintiffs face an extremely heavy burden in convincing the Supreme Court to reverse itself, and anything less than outstanding briefs would be insufficient. AT&T argues that its attorneys spent far less time preparing its supplemental briefs. This argument is not persuasive, however, since AT&T was not in the position of trying to convince five justices that they had made an error of fact. AT&T's burden was much simpler and, understandably, required less effort.

Additionally, in order to focus the Supreme Court's attention on the evidence in the record that the plaintiffs claim the Supreme Court missed, the plaintiffs compiled a new appendix for the court to review. The plaintiffs could not reasonably have expected the Supreme Court to comb through the thousands of pages of the record to find the necessary evidence to support the plaintiffs' position. Compiling this new appendix was an understandably time-intensive task.

This court has reviewed the supplemental briefs and appendix submitted to the Supreme Court by the plaintiffs for which the challenged time was billed, and finds those documents to be of impressively high quality. The court finds nothing unreasonable about the amount of time billed by the plaintiffs for such an important task, upon which the outcome of the entire case depends. AT&T must pay for the full amount of time billed.

J. *Fees on Fees*

AT&T argues that it will pay the fees generated in pursuing the payment of the disputed fees and this motion if the plaintiffs succeed on their motion. Although AT&T has prevailed on a few small points, the plaintiffs have largely carried the day on this motion. The court finds it highly unlikely that the amount of fees in pursuing payment would have been materially different if the few charges upon which AT&T has prevailed had not been included. Therefore, AT&T must pay the "fees on fees."

K. *Miscellaneous Items*

1. *The June 26, 2008 Oral Argument on Remand*

AT&T objects to fees in connection with the attendance of an Abrams & Laster associate at the June 26 oral argument on remand. It is common practice for associates, particularly of Delaware counsel, to attend oral arguments for matters in which they have played a large supporting role. It is a matter of discretion for the lawyer in charge to decide whether or not that attendance justifies billing the time. In this case, there is nothing to suggest that the associate's attendance was not necessary or at least useful to the successful completion of the argument. AT&T must pay the disputed charge.

2. *Travel to the November 5, 2008 Oral Argument*

AT&T objects to 6 hours of time billed by Weil Gotshal for the return travel time to New York following the November 5 oral argument before the Delaware Supreme Court. AT&T contends that the attorneys could have performed other work during that time. According to Weil Gotshal, however, only 2.5 of those 6 hours was for travel. The rest was for "additional preparation on the morning of the argument, a moot court with clients and Delaware counsel, and the time spent presenting the argument itself." Accordingly, AT&T is only being charged for 2.5 hours of counsel's time traveling back from Dover. It may be that AT&T would have preferred that counsel spend that time doing billable work for another client. The fact that counsel was unable to do so, for whatever reason, does not make billing that time unreasonable. It is common practice to bill for "dead" travel time where, for whatever reason, the attorney was unable to perform other work during that time. The court notes that of the three Weil Gotshal attorneys who traveled to Dover, Weil Gotshal has only billed for travel time for one. AT&T must pay this charge.

3. *Summer Associate Time*

AT&T disputes $597.60 in fees and $1,565.08 in expenses billed by Weil Gotshal on the basis that it was time spent by a Weil Gotshal associate conferring with a summer associate on a research task, together with Westlaw charges for the research. The actual time spent by that summer associate in performing that research was written off by Weil Gotshal prior to issuing its bill. From this, AT&T arrives at the somewhat remarkable conclusion that "[i]f summer associate work

product is unbillable, then the time spent by an attorney to instruct summer associates to create that unbillable work product should be charged to recruiting or training, not a client." The latter does not follow from the former. It may be that, as a matter of practice, Weil Gotshal does not bill clients for summer associate time. It does not follow that the time involved in instructing a summer associate on a task exceeds the amount of time the associate would have spent on that task if he had performed it himself. It appears from the original letter from AT&T refusing to pay this charge that its concern was that it was paying for time spent instructing an unidentified timekeeper and that timekeepers' Westlaw charges. It is now clear that the timekeeper was the summer associate, and the Westlaw charges were incurred in performing the research assigned by the associate. AT&T is obligated to pay the fees and expenses.

4. *Premature Research*

AT&T objects to 6.1 hours of research time expended by Weil Gotshal in expectation of an appeal. AT&T contends that this research was premature and "speculative make-work" given that the plaintiffs could not have known the outcome of this court's report on remand and therefore what issues would be presented on appeal. The court shares the plaintiffs' observation that, given the potential likely outcomes of that remand report, an "appeal [was] certain, and the issues on appeal [were] readily identifiable."[13] These charges were therefore reasonable in preparation for the appellate argument that was expected to, and in fact did, come. AT&T must pay these charges.

5. *Inconsistent Time Entries*

AT&T waived at oral argument its objection to this claim with respect to inconsistent time entries for a conference call among Weil Gotshal attorneys.

III.

For the reasons detailed above, the plaintiffs' motion is GRANTED IN PART, and DENIED IN PART. The plaintiffs are to present an order on notice implementing this decision within one week. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor

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[13] Pls.' Opening Br. 10.